Filed 6/18/19 P. v. Purtill CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER GARRY PURTILL, Defendant and Appellant.	C086070 (Super. Ct. No. 16FE023829)

A jury convicted defendant Christopher Garry Purtill of a lewd act upon a child under the age of 14 and six counts of a lewd act upon a child age 14. The trial court sentenced defendant to 12 years in prison, including the upper term on the principal count.

Defendant now contends (1) the trial court erred in excluding evidence of the potential punishment for sex offenses depending on the victim's age, and (2) the trial court abused its discretion in imposing the upper term. We will affirm the judgment.

BACKGROUND

A

Defendant had been best friends with the victim's father for 10 years; the victim considered him to be like family. Defendant and the victim began spending more time together in May 2016, when the victim was 13 years old and defendant was age 27. At the time, the victim was struggling in school and defendant agreed to help him. The two continued spending time together over the summer, including camping trips and pool parties. During the summer, defendant slept in the victim's bedroom three times a week. In August 2016, defendant gave the victim an expensive rim for his bicycle a few weeks before his 14th birthday. One night during the summer, before the victim turned 14, defendant rubbed the victim's penis. Defendant then masturbated and fell asleep.

Defendant subsequently had additional sexual contact with the victim. One time, defendant rubbed the victim's penis and licked his nipples, and the victim masturbated defendant. Another time, defendant orally copulated the victim and masturbated himself. A different time, defendant forced the victim's mouth onto his penis. The victim was 14 at the time of these incidents.

Defendant and the victim also had anal sex after the victim turned 14. Between August and November 2016, defendant and the victim had anal sex each time defendant slept in the victim's bedroom, totaling 30 to 40 times.

The victim's family discovered defendant and the victim having sex together on November 21, 2016.

B

At trial, the victim testified that the masturbation between himself and defendant started when he was 13, although he was unsure of the exact date. The victim remembered due to photos he saw on Facebook, including the date of the birthday present defendant had given him. The oral copulation and anal sex occurred when he was 14.

The victim acknowledged during trial that, two days after being discovered by his family, he told police the incidents with defendant started when he was 14; he explained the situation was stressful and he had not remembered clearly at the time. The victim also told a physician who examined him for sexual assault that the incidents with defendant began in September 2016, or after the victim had turned 14. But in December 2016, the victim told a police officer the abuse started on August 10, 2016, which was before the victim's 14th birthday. At trial, the victim testified that was an incorrect estimate; he remembered that defendant was not at his house that night. During the same December 2016 police interview, the victim also said the abuse happened 50 times, starting in September 2016. A year after the abuse, the victim told the prosecutor that things with defendant started in May 2016, when they started spending more time together and defendant started sleeping in his room.

The stepmother testified at trial that, about two weeks after learning about the abuse, she learned through online research that the punishment for sex offenses was different depending on whether the victim was age 13 or 14. The stepmother asked the police about the potential difference in punishment, noting the punishment was less if the victim was 14. She told a detective that defendant "could pretty much get away with everything" because the victim was 14. She asked the victim whether the abuse started when he was 13 or 14, but the victim said he did not remember. The stepmother told the victim it was "kind of important," and encouraged him to "figure it out at some point." The stepmother suggested the victim jog his memory by looking at Facebook. Although the stepmother testified the victim never told her when the abuse started, she told police the victim said the abuse started on August 10, 2016. The stepmother could not recall when she discussed the issue with the victim.

The victim testified no one told him what to say, except that his stepmother told him to tell the truth. The stepmother had explained to him there were different types of

felonies, but nothing else. According to the victim, no one pressured him to change the dates of the incidents.

Prior to trial, defense counsel sought to introduce evidence of the different potential sentences for lewd acts, depending on the victim's age. Defense counsel argued the stepmother discussed her research with the victim, and the evidence was relevant as to a motive to lie about when the events occurred. The trial court excluded the evidence, reasoning the jury did not need to know or compare the potential sentences for the crimes. According to the trial court, the jury would already be aware that the age of the victim had legal significance because defendant had been charged with one count of a lewd act upon a child under the age of 14, and six counts of a lewd act upon a child age 14. In addition, the jury would hear that the victim was inconsistent about when the abuse started, and also that the stepmother conducted research and realized the punishment was more for count one than counts two through seven.

Defense counsel raised the issue again after the stepmother's testimony. Defense counsel was concerned the jury would think that counts two through seven were insignificant and find defendant guilty on count one just to ensure defendant was punished for his actions. The trial court again denied defense counsel's request, reasoning that it was inappropriate for the jury to consider the specific punishment for each count.

C

The jury found defendant guilty of a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a) -- count one)[1] and six counts of a lewd act upon a child age 14 (§ 288, subd. (c)(1) -- counts two through seven). The trial court sentenced defendant

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[1] Undesignated statutory references are to the Penal Code.

to state prison for an aggregate term of 12 years, consisting of the upper term of eight years for count one, and a consecutive eight months each for counts two through seven.

In imposing the upper term on count one, the trial court considered the mitigating factors, including that defendant had no prior criminal history. (Cal. Rules of Court, rule 4.423(b)(1).)[2] The trial court also noted multiple aggravating factors, including that (1) the victim was particularly vulnerable (rule 4.421(a)(3)), (2) the manner in which the crimes were carried out indicated planning, sophistication, or professionalism (rule 4.421(a)(8)), (3) defendant took advantage of a position of trust and confidence (rule 4.421(a)(11)), and (4) defendant engaged in violent conduct, indicating a serious danger to society (rule 4.421(b)(1)). The trial court disagreed with the argument that the victim was a "willing participant" and described the victim as having been "manipulated and ordered to be willing during the sexual conduct."

DISCUSSION

I

Defendant contends the trial court erred in excluding evidence of potential punishment. According to defendant, the evidence was essential to counteract the stepmother's statement to the detective that defendant could "pretty much get away with everything" if he only committed crimes while the victim was 14. We review a trial court's decision to exclude evidence for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 214-215 (*Alvarez*).)

Under Evidence Code section 352, evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*Alvarez, supra*, 14 Cal.4th at p. 204, fn. 14.) The trial court did not abuse its discretion in determining that the specific sentencing information

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[2] Undesignated rule references are to the California Rules of Court.

would be more prejudicial than probative. Unless a case involves the death penalty, it is well-settled law that a jury may not consider punishment in its deliberations. (*People v. Engelman* (2002) 28 Cal.4th 436, 442.) Such information would invite the jury to exercise its power of jury nullification. (*People v. Nichols* (1997) 54 Cal.App.4th 21, 26.)

Moreover, the jury already had sufficient information to evaluate defendant's argument that the stepmother and the victim lied about when the abuse started so that defendant would suffer harsher consequences. The jury heard about the victim's conflicting statements regarding the start date. Evidence was also presented regarding the stepmother's research, including her statement to police that there was a difference in punishment. The trial court did not abuse its discretion in ruling the jury did not need to hear evidence concerning potential punishment. The jury had sufficient information to assess the credibility of the witnesses.

II

Defendant further contends the trial court abused its discretion in imposing the upper term on count one. According to defendant, the victim was not particularly vulnerable, and there was no evidence the crimes involved planning, sophistication, or professionalism.

A trial court is afforded broad discretion in sentencing decisions. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; see also § 1170, subd. (b).) An upper term sentence may be based on any aggravating circumstance the court deems significant and reasonably related to the decision being made. (*Sandoval*, at p. 848, quoting rule 4.408(a).) A single valid factor is enough to justify imposition of an aggravated term. (*People v. Black* (2007) 41 Cal.4th 799, 813, overruled on other grounds by *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856].)

Defendant took advantage of his position as a trusted family friend. (Rule 4.421(a)(11).) Because a single aggravating factor is sufficient, the trial court did not abuse its discretion in imposing the upper term.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, Acting P. J.

We concur:

/S/
MURRAY, J.

/S/
KRAUSE, J.